IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

DWAYNE UNDERWOOD,

Petitioner,

v. Civil Action No: 1:11-00217

E.K. CAULEY,
Warden

Respondent.

MEMORANDUM OPINION AND ORDER

Pending before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (Doc. No. 1). By Standing Order, this matter was referred to United States Magistrate Judge R. Clarke VanDervort for submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B). The magistrate judge submitted his proposed findings and recommendation ("PF&R") on April 11, 2014 in which he recommended that the petitioner's application be dismissed. Doc. No. 21.

In accordance with the provisions of 28 U.S.C. § 636(b), petitioner was allotted fourteen days, plus three mailing days, in which to file any objections to the PF&R. Petitioner filed his objection to the PF&R on April 28, 2014. (Doc. No. 22). Accordingly, this court has conducted a de novo review. See 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de

novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made."). Petitioner's objection is without merit for the reasons that follow.

I. Background

On January 7, 2000, following a jury trial, petitioner was convicted in the United States District Court for the Eastern District of Pennsylvania of one count of possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); one count of possession of marijuana with intent to distribute, in violation of U.S.C. § 841(a)(1); one count of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). See United States v. Underwood, No. 2:99-cr-0717 (E.D. Pa. May 10, 2000), Doc. Nos. 51 and 52. On May 10, 2000, the district court sentenced petitioner to a total term of 270 months imprisonment. Id., Doc. No. 57. Critical to the current action, the district court applied the career offender enhancement after determining that a prior Pennsylvania state conviction for reckless endangerment constituted a "crime of violence" under U.S.S.G. § 4B1.2(a)(2). The Third Circuit Court of Appeals affirmed the conviction and sentence on December 28, 2001 despite petitioner's contention, among others,

that the district court erred by concluding that reckless endangerment constituted a "crime of violence." United States v. Underwood, 281 F.3d 226 (3d Cir. 2001). Petitioner did not petition the United States Supreme Court for a writ of certiorari. On January 2, 2003, petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct the sentence in the Eastern District of Pennsylvania. Underwood, No. 2:99-717, Doc. No. 76. Petitioner's claims were ultimately denied, and the Third Circuit affirmed the denial. Id., Doc. Nos. 106, 141, and 146; United States v. Underwood, 246 F. App'x 92 (3d Cir. 2007).

On April 4, 2011, petitioner filed the instant application for writ of habeas corpus under 28 U.S.C. § 2241. Doc. No. 1. Petitioner primarily contends that under Begay v. United States, 553 U.S. 137 (2008), decided after his conviction and § 2255 motion, his prior Pennsylvania state conviction for reckless endangerment did not qualify as a crime of violence under U.S.S.G. § 4B1.1. In Begay, the Supreme Court held that "violent felony" as defined in the Armed Career Criminal Act section imposing a special mandatory 15-year prison term on felons who unlawfully possess a firearm and have three or more violent felonies encompassed only crimes that involve "purposeful, violent, and aggressive conduct." Id. at 144-45. The Third Circuit has since determined that reckless

endangerment – one of the crimes for which petitioner received the career offender enhancement because it classified as a "crime of violence" – is no longer a "crime of violence" after Begay. United States v. Lee, 612 F.3d 170, 196 (3d Cir. 2010). ("[F]ollowing Begay, a conviction for mere recklessness cannot constitute a crime of violence.") Based on these authorities, petitioner contends he is actually innocent of the career offender classification, and therefore is entitled to be resentenced.

II. Proposed Findings and Recommendation

First, the magistrate judge concluded that the claims raised by petitioner in his § 2241 petition are ones properly considered under § 2255. The magistrate judge further determined that the petition should not be transferred to the Eastern District of Pennsylvania because petitioner has sought relief under § 2255 in the sentencing court on at least one occasion, and he has not obtained a certification to file a second or successive motion.

Second, and more critical to petitioner's objection, the magistrate judge concluded that § 2255 was not "inadequate or ineffective" to test the legality of petitioner's detention. Therefore, the magistrate judge concluded that petitioner could not satisfy the mandates of the § 2255 "savings clause" which

permits an individual to challenge his conviction in a venue other than the sentencing court.

III. Petitioner's Objection to the PF&R

Petitioner objects to the determination that § 2255 is not "inadequate or ineffective to test the legality of his detention." Petitioner relies on Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013). There, the Seventh Circuit held that a habeas petitioner could invoke § 2241 under the § 2255 savings clause to challenge his sentence on the basis that one of the convictions used to classify him as a career offender, arson in the third degree,[1] no longer qualified as a crime of violence under Begay. Brown, 719 F.3d at 585. The court stated that "the misapplication of the sentencing guidelines, at least where (as here) the defendant was sentenced in the pre-Booker era, represents a fundamental defect that constitutes a miscarriage of justice corrigible in a § 2241 proceeding." Id. at 588.

Petitioner is correct that Brown supports his argument. However, the weight of authority is on the other side of this issue. Every other circuit to address the issue has determined that the savings clause does not permit a prisoner to bring in a § 2241 petition a guidelines miscalculation claim that is barred

[1] The Delaware arson law punished one who "'recklessly damages a building by intentionally starting a fire or causing an explosion.'" Brown, 719 F.3d at 590 (citing 11 Del. C. § 801(a)).

by § 2255(h)'s prohibition on second or successive motions. See Gilbert v. United States, 640 F.3d 1293 (11th Cir. 2011)(en banc); In re Bradford, 660 F.3d 226, 229-30 (5th Cir. 2011); United States v. Peterman, 249 F.3d 458 (6th Cir. 2001); Okereke v. United States, 307 F.3d 117 (3d Cir. 2002). Gilbert, the Eleventh Circuit's en banc decision, is particularly instructive for its elaboration of the principles and policy implications at stake. "The critically important nature of the finality interests safeguarded by § 2255(h) . . . weighs heavily against an interpretation of the savings clause that would lower the second or successive motions bar and permit guidelines-based attacks years after the denial of an initial § 2255 motion." Id. at 1309.

This court is further convinced that the Brown court is on the wrong side of this split by the statement by Judge Easterbrook concerning the circulation under Seventh Circuit Rule 40(e).[2] Then Chief Judge Easterbrook wrote,

> Arguments that contradict circuit law can serve a purpose: If Brown had presented his argument earlier, Begay v. United States might have come in 2000, as Brown v. United States. The reason Begay came out as and when it did was that Begay made his argument at sentencing and pursued it all the way to the Supreme Court.

[2] The statement reads as a dissent, however Judge Easterbrook was not on the panel. "[A]ppellate judges may explain why they have not voted to hear a case en banc, even though they doubt the soundness of the panel's decision." Brown, 719 F.3d at 596.

Id. at 598. He concluded that the Brown "decision undermines finality by authorizing successive belated, collateral attacks." Id. at 600.

The Fourth Circuit has not squarely addressed this issue in a published opinion. In Farrow v. Revell, 2013 WL 5546155 (4th Cir. 2013), an unpublished decision, the court concluded that a challenge to a classification as an armed career criminal is not cognizable in a § 2241 petition. Id. at *1. Furthermore, the Fourth Circuit has not extended the scope of the savings clause to encompass challenges to sentences rather than convictions. United States v. Poole, 531 F.3d 263, 267 n. 7 (4th Cir. 2008). Rather, the savings clause is satisfied when: "(1) at the time of conviction, settled law of this circuit or the Supreme Court established the legality of his conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provisions of § 2255 because the new rule is not one of constitutional law." In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000)(emphasis supplied).

It seems apparent that petitioner could meet the first and third prong of the Jones test. However, he cannot satisfy the second prong. That is, the conduct of which petitioner was convicted remains criminal. Furthermore, petitioner does not

allege an intervening change in law that establishes his actual innocence of even the underlying conviction for reckless endangerment. See United States v. Pettiford, 612 F.3d 270, 284 (4th Cir. 2010)(holding that "actual innocence applies in the context of habitual offender provisions only where the challenge to eligibility stems from factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes."). Petitioner's contentions that he is actually innocent of being a career offender, a sentencing enhancement, are therefore not cognizable under § 2241.

IV. Conclusion

Petitioner cannot satisfy the requirements of the savings clause. Section 2255 is not "inadequate or ineffective" to test the legality of petitioner's detention. As such, the magistrate judge correctly determined that the § 2241 petition should be dismissed.

Accordingly, the court OVERRULES petitioner's objection to Magistrate Judge VanDervort's PF&R. The court adopts the factual and legal analysis contained within the PF&R, DISMISSES petitioner's application for writ of habeas corpus (Doc. No. 1), and DISMISSES this matter from the court's active docket.

The Clerk is directed to forward a copy of this Memorandum Opinion and Order to petitioner, pro se.

IT IS SO ORDERED on this 22nd day of August, 2014.

ENTER:

David A. Faber
Senior United States District Judge